Supreme Court of the United States

ROBERT E. TOD, COMMISSIONER OF IMMIGRATION,
Petitioner,
vs.
SZEJWA WALDMAN AND HER THREE MINOR CHILDREN,
Respondents.

October Term
1924
No. 95

BRIEF FOR RESPONDENTS

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SUBJECT INDEX.

CASES AND AUTHORITIES CITED.

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BRIEF FOR RESPONDENTS.

This cause is here on Certiorari to the U. S. Circuit Court of Appeals for the Second Circuit, to review a determination of that Court, (289 F. R. 761), discharging the four relators in Habeas Corpus proceedings from an excluding determination under the Immigration Laws (Record, p. 23, fol. 33). As pointed out by the lower Court in its opinion on rehearing, its determination does not preclude the Government's beginning appropriate proceedings for deportation (Record, p. 25, fol. 40), to wit, under the Secretary of Labor's warrant of deportation, issuable under Sec. 19 of the Immigration Act of Feb. 5, 1917 (Pearson *vs.* Williams, 202 U. S. 281)^ The sole ground

^ [illegible]

for the application for the Certiorari was whether the Court ought not to have remitted the case to the District Court for further proceedings there, instead of discharging relators without prejudice to other administrative proceedings, and that, of course, is the sole point open to the Government. (Alice Bank *vs.* Houston Co., 247 U. S. 240.) Respondents are, however, of course free to sustain the order appealed from on any ground open under the record (Camp *vs.* Gress, 250 U. S. 308, 318; Air Works *vs.* Bridgewater Co., 132 F. 16 C. C. A.).

Statement of Facts.

Relators arrived at Ellis Island August 28th, 1922, after embarkation at Havre on August 19th, 1922, (Record, pp. 1 and 11), and their place of birth and last permanent residence was the town of Proskurow, in the province of Podolia, Russia, (Record, p. 1), which province is part of the Ukraine (*Ency. Britannica, 1922; Vol. 32, being Vol. III of the Supplement*, pp. 829-30; Statesman's Year Book for 1921, p. 1252; New International Year Book 1920, p. 379). They consist of Mrs. S. Waldman, 32 years of age, and her three daughters, aged 12, 9 and 7 respectively, and all their testimony was given through an interpreter (Record, pp. 1a, 2). All four were born and always lived at Proskurow (p. 1), until about April, 1921, when they left that town 17 months before arrival here, fearing repetition of pogroms there, in which 25 of her relatives were killed in 1919 (p. 3). They lived thereafter temporarily in Eastern Galicia (p. 3). Mrs. Waldman's husband died about six years before her arrival in this country (p. 4; compare p. 1), and she has since both in

their native town and in Galicia supported herself and her three children as a seamtress, earning enough even there to maintain them all (p. 2), but not enough to pay the considerable sum required for passage money, which was sent to her by brothers and sisters in this country (p. 2). She has three brothers and three sisters living here, who have been here from 12 to 30 years, all ready and able to aid her and her children, and to give assurances that the children will go to school (pp. 1, 2). Two of these testified before the Board of Special Inquiry. One was Harris Lisker of Providence, R. I., a U. S. citizen, married, having a salary of $3000 per year as agent of the Metropolitan Life Insurance Co. and owning real estate here, and having $1800 saved (pp. 3-4). Another was Hyman Lisker, also of Providence, R. I., who has been here fifteen years and is a collector of rents, with $800 saved. The Habeas Corpus petition also refers to John Lisker of Providence, a cousin of Mrs. Waldman's, who with his wife are taxed for approximately $150,000 in Rhode Island, and are also willing to support the family (p. 9), all being ready to give bonds against their becoming public charges (p. 9).

One of the children, Zenia Waldman, age 7, is lame, which is the meaning of the medical certificate (Record, p. 1) that she is "afflicted with dislocation of left hip, with shortening of left leg, and lameness, which may affect ability to earn a living," the latter qualification being of course without significance on ability to support herself, except in the case of a person thereafter shown by evidence before the Board of Special Inquiry to be following such occupation as acrobat or the like.

statutory right of appeal to the Secretary, as the Court below also held. The record fails to show what the matter was that she was called upon to read. It merely stated at the first hearing:

> "Cannot read. Tested class 5-1608 Yiddish (By Insp. Travis: *Reads some of the words and repeats to interpreter without looking at the text, but cannot make any connecting thought*" (Record, p. 1).

The method of administering the test is considered under Point III (*post*, p. 52).

In a recent case (U. S. ex rel Friedman *vs.* Tod, 296 F. R. 888) the same Circuit Court of Appeals properly held that the matter selected for the reading test, as there disclosed, did not meet the statutory requirement of

> "words in ordinary use"

and *non-constat* that this was the case here, too.

On the appeal in the instant case, the Secretary of Labor directed a new literacy test to be administered to Mrs. Waldman in *both Yiddish and Hebrew*—for which there is no warrant in the statute—and also unlawfully directed that "in case she fails to pass the test, that they all be deported without further reference of the case to the department" (Record, pp. 6-7, compare 10). She was accordingly, tested in both Yiddish and Hebrew, and they were all ordered excluded anew, and not advised of their statutory right to appeal anew (Record, pp. 5, 7). Without apparently pass-

ing on the very strong evidence in the record, bringing relators within the exemption of the "religious refugee" provision of the literacy test—on which the Board made no finding *pro* or *con*—the mother was excluded as illiterate, Zenia Waldman as a person suffering with a physical trouble which may affect ability to earn a living, and all as "likely to become public charges and assisted aliens" (pp. 5, 7). Of course, if the mother be excluded, there would be justification for regarding the young children as excludable, as likely to become public charges, but not otherwise, and they would also be within the spirit of the provision (Sec. 3) excluding "all children under sixteen, unaccompanied by or not coming to one or both of their parents, except that any such children may, in the discretion of the Secretary of Labor be admitted" etc. The Secretary of Labor, accordingly made the case turn—as indicated by a letter he wrote to U. S. Senator Colt, who interested himself in the case—on the question of literacy (Record, p. 10), practically eliminating the "likelihood to become a public charge" issue, and the U. S. Circuit Court of Appeals also so treated it (pp. 21-2). In fact there is no evidence in the record of an affirmance on appeal by the Secretary of any excluding decision, though this is jurisdictional. The evidence on the issues other than the literacy test and its exemption clause is further analyzed *post* Point IV and shown to be insufficient in law to justify exclusion. The Court of Appeals properly held that the opportunity to appeal anew was improperly withheld, and also that the record failed to show a proper administration of the literacy test (pp. 19-22).

Strangely enough, however, the Circuit Court of Appeals refused to pass, as unnecessary, *on the question whether relator Mrs. Waldman was within the religious refugee exemption of the literacy test, (though in that event, there was no authority to apply the test at all)*, saying (Record, p. 22):

> "In view of the foregoing *it is unnecessary to discuss the contention that the record shows that relators left their last permanent residence because of religious persecution*, and hence *that illiteracy was not a bar under section 3 of the statute.*"

The evidence as to religious persecution in the record, elicited from Mrs. Waldman, through an interpreter, is as follows (Record, p. 3):

> "Q. Are you leaving the country of your last permanent residence to avoid religious persecution on account of your religious belief or your race? A. I left my native town seventeen months ago (*April 1921*) *as soon as I could after a series of pogroms in my town three years ago.*
>
> Q. Have you had any pogroms or persecutions practices in your native town since that time? A. There were no more pogroms, but *there was on two occasions a general looting of Jewish property.*
>
> Q. Then you didn't leave your native town on account of persecutions because of your religion or race. A. *We were all in fear of repetition of pogroms* and *twenty-five of my relatives in that town were killed at that time.*
>
> Q. How long ago? A. Three and one-half years ago. (Feb. 1919.)
>
> Q. Were you or your children ever molested in your native town prior to leaving for the United States? A. No, except that *I had to*

hide with my children on several occasions during those pogroms."

She was also asked the irrelevant questions, in view of the express reference in the Act to "religious persecution in the country of their last permanent residence":

Q. When you left your native town, seventeen months ago, to what place did you go? A. To Eastern Galicia, Lemberg.

Q. *Was there any religious persecution there?* A. No.

The evidence is corroborated by the fact that she holds a passport, issued in Poland December 12, 1921 (Eastern Galicia having become part of Poland), visced by the U. S. Consul at Warsaw by special authorization of the State Department April 7, 1922 (Record, p. 1). Delays in securing visee of passports and limitation of immigration under the Quota Law—relators not being within the classes thereby preferred—as also difficulties till lately in transmitting money to the former Russian dominions, of course accounts for much of the lapse of time, both before and since relators left Proskurow in April 1921. It is also well known that by special intermediation of the League of Nations and philanthropically disposed persons, Galicia afforded a temporary refuge to refugee Jews from Russia and Ukraine, despite her own home difficulties.

The Petition in the Habeas Corpus Proceedings (Record, p. 9) directly invokes the religious persecution exemption of the statute, and alleges that *Mrs. Waldman was ordered to be shot by the Russian authorities,* but that she escaped, and later

made her way to France; also that *she escaped from prison, where she was placed by her persecutors, and that on the very day of her escape from prison, two of her husband's cousins were killed*, and that if she is deported, she will finally be returned to Russia, where she will be in danger of death on account of her religious faith. It further alleges that the *claim of exemption from the literacy test was not passed on by the immigration authorities.*

Matter To Be Noticed Judicially or Provable Before the Secretary.

As a matter of fact, the pogroms directed at the Jews in the Ukraine, and particularly that of Proskurow of February 1919, have attracted so much attention, that the general facts should be noticed judicially. This is in accord with the decisions of this Court, as to the courts' taking judicial notice of "what every one is supposed to know" and the history of our time, and refreshing their recollection by resort to appropriate authorities

Brown *vs.* Piper, 91 U. S. 37;
Underhill *vs.* Hernandez, 168 U. S. 250;
Galveston Elec. Co. *vs.* Galveston, 258 U. S. 388, 402;
Collins *vs.* Loisel, 259 U. S. 309, 314;
23 Corpus Juris, 116-120; compare 56-60;

and it will be observed *post* (pp. 36-8) that in construing the analogous exemption of religious and political refugees found in the British Aliens Act of 1905, from which our exemption was avowedly taken, it was expressly stated that "*common*

fame" as to persecutions abroad should be taken into account, and the Home Secretary's instruction expressly referred to "the present disturbed condition of certain parts of the Continent."

The treatment of the Jews in the Ukraine, and the pogroms that occurred there between 1917 and 1922, are well summarized in a cablegram in the *N. Y. Times of Sept. 16, 1924*, on the basis of a Ukrainian Government Commission report, as follows:

> "The Jewish population, which number in Russia over 6,000,000 live scattered except in the Ukraine and White Russia regions, where they are more concentrated because in old C'zarist Russia these regions formed a sort of ghetto for the Russian Jewry, who had been forbidden to live in the majority of Russian towns and in entire rural districts.
>
> The revolution freed the Jews from the oppression of the C'zar's regime, but the intervention and civil war which followed, subjected the Jews to greater sufferings than any other section of the Russian population. White Russia and the Ukraine both became theatres of war.
>
> The civil war in the Ukraine witnessed a succession of *eighteen Governments, each of which considered fostering national hatred as the best policy to dissipate discontent. Numerous bandit groups following each other made the Jews the scapegoat in their struggle against the Reds.* Official figures collected by the Ukraine Government Committee, who investigated the loss of life and property caused by the intervention and civil war show that *there occurred in the Ukraine region 1,235 pogroms, wherein 70,000 Jews were killed, over 500,000 driven from their homes and 200,000 children rendered orphans.* A great number of houses were demolished, while a number of small towns and villages were en-

tirely destroyed. *Several towns experienced more than twenty pogroms.*"

Compare *New International Year Book for 1920* (published 1921), (p. 379):

> "Jews-Ukraine: There were insistent reports of the continuation of anarchy in the Ukraine. The Jewish community of America had tragic evidence in the murder of the two martyrs, Israel Friedlaender and Bernard Cantor, the former a member of the Joint Distribution Committee. At the close of the year there did not seem to be any indication that conditions were likely to improve in the near future, and the only hope for the restoration of order and civilized life in Southwestern Russia lay in the setting up of a constitutional government, answerable to the influence of the public opinion of the rest of the world."

New International Year Book for 1921 (published 1922), says at p. 397:

> "The Jewish population of the Ukraine had suffered undescribable hardships. Persons of all classes, including the wealthiest were reduced to beggary and it was reported that there was hardly a single Jewish child under seven years of age left in the Ukraine. Probably twice as many Ukraine Jews had died from exposure or disease as had been massacred."

The word "pogrom" used above and in the record is defined in the "*Century Dictionary*," Vol. XII, as follows:

> "In Russia an organized massacre, particularly a massacre of Jews that is countenanced more or less openly by the officials. The pogroms are attributed by Mr. Lucien Wolf, a well known and responsible writer, to direct

> Governmental action. They were, however, carried out by the assistance of local mobs, animated by intense prejudice, if not by superstition. *Athenaeum*, Jan. 26/27, p. 99."

Perhaps a description given by Mr. Trevelyan in the British Parliament on April 18, 1905 (British Parliamentary Debates, 4th Series, Vol. 145, p. 703) is still more apt:

> "We know that in Russia now and for many years there has been practically licensed mob violence against the Jewish population, which may break out anywhere and at any time, which is not in any way restricted by the police, but in many cases is obviously sanctioned and encouraged by them."

In the section dealing with *Ukraine*, the American Jewish Year Book for successive years, reports the following happenings:

American Jewish Year Book for 1919-1920 (pp. 286-9), (covering year from June 1918 on):

p. 287: *Feb. 15 (1919) Podolia. Terrible pogroms in many places, lasting 7 days. Many Jews killed and hanged.*

March 7: *Proskurow: Yiddish Morgenpost of Vienna reports 400 Jewish families massacred in pogrom.*

p. 289, April 18, Husiatyn and Fastov: 2500 Jews killed or wounded; at Popniaska, 250 Jews are killed.

May 9, Zlotchev: Ukrainian troops revolt and attack Jewish shops; over 70 business places plundered.

May 30, Ananyev (Odessa district) Pogrom: 62 Jews killed; nearly all houses and shops of Jews plundered.

American Jewish Year Book for 1920-1 (pp. 277-83, covering year from June 1919 on):

(p. 277) June 2, 1919: Nearly all Jewish shops and houses in Kamenetz-Podolsk plundered and about 100 Jews killed.
Aug. 2 (Odessa): Report of 3-day massacre in Jewish quarter, from which it is reported no one escaped.
Aug. 8, Urinin: 40 Jews massacred.
Sept. 2, Zhitomir: Anti-Jewish excesses.
Sept. 5, Perevaslav: Massacre of Jews; 326 reported killed.
Sept. 22-8, Fastov (near Kiev): 1600 to 2000 killed or seriously wounded in 6-day pogrom. Over 200 houses burned down.
Sept. 26: Anti-Jewish massacre in many villages in vicinity of Kamenetz-Podolsk.
Oct. 18, Kiev: On re-entry of Denikin's troops, 3-day massacre of Jews; 400 Jews killed in this district.
Dec.: Fresh excesses.
Jan. 2 (1920), Mezhibez (Podolia): Pogrom lasts several days. Jews killed and nearly all shops and houses plundered.
Feb. 6, Korsun (Podolia): Bolsheviki execute rabbi and 12 Jewish notabilities.
Feb. 24, Zamichov (Podolia): Pogroms occur. 30 Jews killed and over 100 wounded (another attack March 18th).
March 19, Eletz: 200 persons reported killed. Many Jewesses attacked and some murdered. Dubosary: Pogrom by remnants of Denikin's army; 15 Jews killed. Moldavanka (suburb of Odessa): attacks made nightly on Jews. Bolsheviki arrest number of Jewish communal workers.

American Jewish Year Book for 1921-2 (covering year from June 1, 1920, p. 209 *et seq.*):

June 4 (1920), Kiev (suburb of): Peasants drive 55 Jews into synagogue, which they burn.

July 5: Prof. Israel Friedlander and Rabbi Bernard Cantor, envoys of the Joint Distribution Committee, robbed and slain by bandits.

July 23, Tonshva: Occupation by Petlura, followed by anti-Jewish riots. Crowded synagogue burnt.

Oct. 1: Eleven towns in the province of Kiev and seven in the province of Volhynia suffer heavily from pogroms.

Nov. 17: Federation of Ukrainian Jews of London informed by Jewish National Committee, Warsaw, of series of fresh pogroms throughout the Ukraine by Soviet-Russian forces and Petlura's followers.

Dec. 24, Proskurow, Krassilov, Micolayev and Tshorniostrov: *Stragglers of Petlura's armies commit anti-Jewish atrocities.* Ekaterinoslav: Pogrom lasting 6 days carried out by Makhno's gangs. Hundreds of Jews killed and thousands wounded.

April 24 (1921): Outbreak of pogroms in government of Homel by gangs of criminals, the band of Goliaka.

May 6 (1921), Dubrovno: Massacre of Jews assumes enormous proportions.

Zhitomir: Pogrom activities of Ataman-Struk confirmed.

As it happens, the very pogrom at Proskurow of Feb. 1919, which Mrs. Waldman testified to, has been described at length (pp. 39-43; 202-227), in a published work containing an investigation of the Ukrainian pogroms, conducted by the Russian Red Cross Association, entitled

> "*The Slaughter of the Jews in the Ukraine in 1919*", by Elias Heifetz (N. Y., 1921)

from which the following is summarized:

Proskurow is a town in the government of Podolia, with a population of 50,000, about half Jews.

About three weeks before the Proskurow massacre, a convention of the Bolsheviki of the province of Podolia took place in Vinnitza, at which Bolsheviki uprisings on Feb. 15th throughout the province were decided upon. In Proskurow, two regiments were quartered, with definite Bolshevik tendencies, who announced that they would not interfere. More than 1200 persons were killed in Proskurow and environs, and out of 600 wounded, more than 300 died . . . "It was the sad function of Proskurow to establish a new phase in the technique of pogroms. Previous pogroms had as their chief purpose, robbery, that is, the stealing of Jewish property; murders followed the looting, but still they were not the principal purpose. . . . Beginning with Proskurow, the basic purpose of the pogroms in Ukraine appears as the total destruction of the Jewish population. Looting was also widely practised, but it took second place . . . In Proskurow, only Jews were massacred" (p. 227).

In U. S. Senate Document No. 611 of the 63rd Cong., 2nd Session (1914) entitled "*Illiteracy Among Jewish Immigrants and Its Causes*" a paper was reprinted, prepared by Mr. Goldberg of the Petrograd bar in which the following item occurs concerning this very town as it was ten years ago (p. 18):

> "*Proskurow, Province of Podolsk.* Jewish population 80 per cent. The city schools maintained exclusively by the income derived from the Jewish population. In 1911 not only was admittance refused to Jewish children, but 20 Jewish pupils who had previously attended the Government schools, were discharged. In the year 1912 not a single Jewish child was admitted to the Government schools."

It was shown in the same document that this educational discrimination against the Jews of Russia was so serious that the First All-Russian Conference of Primary Education held in St. Petersburgh in January 1914 adopted resolutions of protest against the same (pp. 9-10). Private Jewish schools could not be adequately substituted, even apart from the economic distress among the Russian Jews, because necessary permits for opening them were repeatedly withheld (pp. 19-20), and because the Russian Governmental policy opposed them for girls (p. 8). Even when opened, the necessary certificates of residence were repeatedly withheld from the teachers, and if the language of instruction therein was Russian, the teacher was subject to prosecution, and the same was the case, if Yiddish was the medium of instruction (p. 21).

STATUTE AND REGULATIONS APPLICABLE.

The Literacy Test Clause of Sec. 3 of the Act of 1917, in enumerating the excluded classes, reads as follows:

> "*All aliens over sixteen years of age, physically capable of reading, who can not read the English language or some other language or dialect, including Hebrew or Yiddish*: Provided, That any admissible alien, or any alien heretofore or hereafter legally admitted, or any citizen of the United States, may bring in or send for his father or grandfather over fifty-five years of age, his wife, his mother, his grandmother, or his unmarried or widowed daughter, if otherwise admissible, whether such relative can read or not; and such relative shall be permitted to enter. *That for the purpose of ascertaining*

whether aliens can read, the immigrant inspectors shall be furnished with slips of uniform size, prepared under the direction of the Secretary of Labor, each containing not less than thirty nor more than forty words in ordinary use, printed in plainly legible type in some one of the various languages or dialects of immigrants. Each alien may designate the particular language or dialect in which he desires the examination to be made, and *shall be required to read the words printed on the slip in such language or dialect.* That *the following classes of persons shall be exempt from the operation of the illiteracy test*, to wit: *All aliens who shall prove to the satisfaction of the proper immigration officer or to the Secretary of Labor that they are seeking admission to the United States to avoid religious persecution in the country of their last permanent residence, whether such persecution be evidenced by overt acts or by laws or governmental regulations that discriminate against the alien or the race to which he belongs because of his religious faith . . .*"

Rule 4, Reading Test, of the Secretary of Labor's Immigration Regulations reads:

> Subdivision 1. *Who subject thereto and by whom examined*—All aliens over 16 years of age who are physically capable of reading, except as specified in the statute and described in subdivision 5 of this rule shall be required to demonstrate their ability to read matter printed in plainly legible type and in a language or dialect designated by the alien at the time of examination.
>
> Subd. 2. *General method of applying the reading test.*—When applying the reading test, immigration officers shall use the printed and numbered slips supplied by the bureau

for that purpose, and a record shall be made upon the manifest or board minutes showing both the class and serial numbers of slip used in each case and the language or dialect designated by the applicant and actually used in the examination. No two aliens listed upon the same manifest sheet shall be examined at seaports by the use of the same slip. If the examining inspector is unable to speak and understand the language or dialect in which the alien is examined, *the services of an interpreter shall be used for interpreting into spoken English as read the printed matter read by the alien, so that the examining inspector may compare such interpretation with the slip of corresponding serial number containing the English translation of the same reading matter.* . . .

Subd. 4. *Examination by board of special inquiry.*—In the event the applicant is subject to the reading test and is unable to satisfy the examining or challenging of his ability to read matter printed in the designated language or dialect, it shall be the duty of either the examining or challenging inspectors to detain the applicant for special inquiry and to record upon the manifest and detention cards, for the information of the board, the class and serial numbers of the slip used in the primary examinations. Applicants so detained shall be examined by boards of special inquiry as to their ability to read, in the same manner as aliens detained for special inquiry upon other grounds. The examination shall be conducted as prescribed in subdivisions 1 and 2 of this rule, and the result shall be noted in the recorded minutes.

Subd. 5. *Exemptions.*—The following classes of aliens over 16 years of age are exempted by law from the illiteracy test or from the "operation," viz: . . .

(c) *Persons seeking admission to the United States to avoid religious persecution*

in the country of their last permanent residence. . . .

Subd. 6. *Method of determining right to exemption.*—All claims to exemption from the operation of the illiteracy provisions of the Immigration Act shall be made the subject of careful inquiry by the examining inspector, who, if he is not convinced that the applicant is entitled to exemption, shall detain him for investigation by a Board of Special Inquiry. *In all cases in which the exemption claimed is not fully established before such board the alien, if illiterate, shall be debarred.*

Subd. 7. *Proof of exemption.—Clear and convincing proof of claims of exemption from the illiteracy test shall be required in every instance.*

POINT I.

The Circuit Court of Appeals properly discharged relators without prejudice to further administrative proceedings (1) because administration of a literacy test in a foreign language was involved, a non-judicial function, (2) because the statute authorizes submission of proof of exemption from the test because of religious persecution direct to the Secretary of Labor, and (3) because the record indicates that a much more satisfactory hearing can be had before the Secretary of Labor in warrant proceedings.

(a) *As relators were absolutely admissible and exempt from the literacy test as religious refugees, as further argued hereinafter, the order below was correct.*

It will be observed that the Circuit Court of Appeals in its opinion, expressly refrained from

deciding *pro* or *con*, whether the evidence did or did not exempt Mrs. Waldman from the literacy test altogether as a religious refugee (Record, p. 22). (Of course, her children are concededly exempt, under the statute, because under 16.) But if relators are religious refugees, there was no authority to administer the literacy test at all.

In the subsequent case of

> *U. S. ex rel Boxer* vs. *Tod*, 294 Fed. Rep. 628,

the same Circuit Court of Appeals held that the District Court had properly ordered relator's discharge, where the Board of Special Inquiry had failed to interrogate an alleged illiterate Jewish immigrant from Russia as to his reasons for coming over, unless a new hearing were had, in which this exemption were gone into. In distinguishing an earlier case, in which the immigrant had testified she came over to be married (U. S. *ex rel* Ghersin *vs.* Commissioner, 288 F. R. 756 C. C. A.), the Court, speaking by Judge Rogers said:

> "All this court decided was that, in view of the general inquiry as to her reason for leaving, the board was not bound to *ask expressly* whether she left *to escape religious persecution*. In the instant case no such general question had been asked and *the board had no information whatever before it upon that subject, and without such information it could not determine whether the applicant was or was not subject to the illiteracy test. But while upon the facts disclosed upon this record, we sustain the right of the judge to send the matter back for a further hearing*, we are unable to sustain the order he made directing the immigration officials to discharge the relator from custody."

In the present case, while a very superficial examination was made of Mrs. Waldman on the religious refugee question, the Board of Special Inquiry failed to adjudge *pro* or *con*, whether they are religious refugees or not (Record, p. 5). It is submitted that the recent decision of this Court in

> *Wichita Co.* vs. *Public Utilities Commission*, 260 U. S. 48

followed and applied by it in *Mahler* vs. *Eby*, 264 U. S. 32 is in point, holding that where the right of a utilities commission to change contract rates is dependent upon a finding that subsisting rates are unjust, there must be an express finding to that effect, to sustain increased rates.

See also

> *Rodgers* vs. *U. S.*, 152 Fed. Rep. 346, 349 C. C. A.

and the instant case on the other points involved. Here the questions put by the Board of Special Inquiry furthermore clearly indicate that it had no comprehension of the real scope of the religious refugee exemption.

(b) *Counsel for Respondents concede that, in general, where an unfair hearing before the immigration authorities is shown, the Federal Courts should conduct the further hearing themselves under Sec. 761 U. S. Rev. St.*, and so completely dispose of the case themselves, especially as the courts have no direct reviewing authority over the immigration authorities, as pointed out in U. S. *vs.* Williams, 193 Fed 228, 231, by Learned Hand, J. Practical experience has shown that injustice is apt to result by referring a case back to

the immigration authorities, who commonly bitterly resent an appeal to habeas corpus proceedings. This is well indicated by the case of *Exp. Petkos*, 212 F. R. 275, for example, where the immigration authorities, after their original error had been called to their attention, promptly ordered exclusion anew on another erroneous ground. Even respecting federal judges, who are not given to petty vanities, the rule is that a judge should not sit in review of his own decisions, if practicable (*U. S.* vs. *Lancaster*, 5 Wheaton 434; *Moran* vs. *Dillingham*, 174 U. S. 153; *Van Arsdale* vs. *King*, 152 N. Y. 69), a conclusion reached by this Court, in the first-cited case, Chief Justice Marshall writing, without a statutory provision. Similarly, where an appellate court reverses in a case tried before a referee, it is usual to order the new trial to take place before a different referee (Compare *Matter of Bliss*, 39 Hun. 594, and as to administrative hearings under the immigration laws, *U. S.* vs. *Redfern*, 180 F. R. 500). I agree with counsel for the Government that the circumstance that *Chin Yow* vs. *U. S.*, 208 U. S. 8, 13 involved a claim to citizenship on the part of one excluded under the Chinese Exclusion Laws, is purely accidental, and will not attempt to sustain the course of the lower court on the ground assigned by it, peculiar to Chinese Exclusion cases involving claims to citizenship. This was well pointed out in non-Chinese cases as the proper course in

> *U. S.* vs. *Williams*, 193 F. R. 228;
> *Whitfield* vs. *Hanges*, 222 F. R. 745, 756 C. C. A.

The fullest discussion of the jurisdiction and procedure of the Courts on Habeas in immigration cases is to be found in

In re Jung Ah Lung, 25 Fed. Rep. 141,

involving one concededly an alien, affirmed by this Court without much discussion of the question in

U. S. vs. *Jung Ah Lung*, 124 U. S. 621.

Long before the decision in the *Chin Yow case*, but after the reviewability of the immigration authorities' decisions had been limited by statute, it was established practice for the Federal Court to take the further evidence itself, where the immigration authorities had rendered an unfair decision

In re Monaco, 86 F. R. 117 Lacombe J.;
In re Koramchl, 87 F. R. 314 Lacombe J.
Gee Fook Sing vs. *U. S.*, 49 F. R. 146, 147 C. C. A;
Sink Tuck vs. *U. S.*, 128 F. R. 592, C. C. A.

Sometimes, of course, the record contains evidence making it unnecessary to hold any further hearing and justifying the appellate court's order of discharge, as in

Gegiow vs. *Uhl*, 239 U. S. 3 (following the Lau Ow Bew case, 144 U. S. 47, 48, 64),

where petitioner's brief collated the chief authorities (pp. 75-6).

Compare

Mahler vs. *Eby*, 264 U. S. 32.

(c) *In the instant case, however, the Circuit Court of Appeals properly discharged relators without prejudice to new administrative proceedings, because administration of a literacy test in a foreign language is involved, a non-judicial function which the Federal Courts cannot legally undertake.*

Under numerous authoritative decisions, such action as administration of a literacy test in foreign languages, or supervising the same, is a non-judicial function.

Hayward's Case, 2 Dallas, 409 note;
Muskrat *vs.* U. S., 219 U. S. 346;
Keller *vs.* Potomac Co., 261 U. S. 428;
Honolulu R. Co. *vs.* Hawaii, 211 U. S. 282;
Western Union Tel. Co. *vs.* Myatt, 98 F. R. 335, Hook, J.;
Ex p. Gans, 17 F. R. 471;
Ex p. Riebeling, 70 F. R. 310;
U. S. *vs.* Queen, 105 F. 269;
In re Spingarn, 96 N. Y. Misc. 141 Rev.;
State *vs.* Brill, 100 Minn. 508;
Housman *vs.* Kent Circuit Judge, 58 Mich. 364;
Roby *vs.* County Commissioners, 92 Md. 150;
Bondy: The Separation of Governmental Powers.

In Keller vs. Potomac Co., *supra*, this Court held a statute unconstitutional, authorizing it to review on appeal the legislative discretion of a public utilities commission in fixing rates, saying:

> "Such legislative or *administrative jurisdiction, it is well settled, cannot be conferred*

> *on this court either directly or by appeal.* The latest and fullest authority upon this point is to be found in the opinion of Mr. Justice Day, speaking for the court in Muskrat *vs.* U. S., 219 U. S. 346. The principle there recognized and enforced on reason and authority is that the jurisdiction of this court, and *of the inferior courts of the United States ordained and established by Congress under and by virtue of the third article of the Constitution is limited to cases and controversies in such form that the judicial power is capable of acting on them;* and does not extend to an issue of constitutional law framed by Congress for the purpose of invoking the advice of this court without real parties or a real case, *or to administrative or legislative issues or controversies.*"

In Honolulu R. Co. vs. Hawaii, *supra,* this Court held that the legislature could not legally vest the courts with power to regulate the schedule for running cars.

In Western Union Telegraph Co. *vs.* Myatt, *supra,* Judge Hook ably collated and analyzed the authorities involved, and decisions in the various state courts are ably collated in State *vs.* Brill, *supra,* holding that courts cannot be required to prepare syllabi of cases. In Ex. p. Gans *supra,* Ex p. Riebeling and U. S. *vs.* Queen, *supra,* a statute requiring the federal courts to certify to the value of the services of informers in smuggling cases was held to be unconstitutional. In Housman *vs.* Kent, *supra,* it was held that the courts cannot perform such administrative duty as to appoint surveyors to examine premises to enable them to relevy a void drain tax. In Robey *vs.* County Commissioners, *supra,* it was held that courts cannot be required to approve the accounts of constables, sheriffs and other officers.

In Matter of Spingarn, 96 N. Y. Misc. Repts. 141, Surrogate Fowler held that the surrogate's court cannot be required to render such administrative function as to compute an inheritance tax on alternative theories, one of which may not occur, and while his application of the principles was disapproved on appeal in 175 N. Y. App. Div. 806, his summary of the law was there approved. He said:

> "A judge cannot be compelled to do a ministerial act. The principle to which I refer, as plainly violated by the present application, is well recognized. Judge Cooley states it, and of course with his usual accuracy, when he says: 'Upon judges, as such, no functions can be imposed except those of a judicial nature.' There are many adjudications to the same effect, only some of which need be cited. Note to Hayburn's Case, 2 Dall. 409; Haine *v.* Levee Commissioners, 19 Wall. 661. The New York cases are to the same effect. In People ex rel McDonald *v.* Keeler, 99 N. Y. 463, 480, the Court of Appeals said that although the Constitution of New York does not contain a declaration similar to that of the Constitution of the United States in regard to separation of powers, the principle was recognized in this state. In Matter of Davies, 168 N. Y. 89, 101, the Court said: 'Free government consists of three departments, each with distinct and independent powers, designed to operate as a check upon those of the other two co-ordinate branches. The legislative department makes the laws, while the executive executes, and the judiciary construes and applies them. Each department is confined to its own functions and can neither encroach upon nor be made subordinate to those of another without violating the fundamental principle of a republican form of government.'"

(d) *In view of the express statutory authorization to submit proof of the exemption as to being a religious refuge direct to the Secretary of Labor, and not merely to the immigration official, the Circuit Court of Appeals properly discharged relators without prejudice to proceedings on the Secretary's Warrant, a ground here fortified by the offer, in the Habeas petition, to give bond against the aliens becoming public charges.* It will be observed that the statute expressly, in the alternative, permits submission of this proof to the Secretary, and not merely to the immigration official. This was done advisedly, because it was recognized that summary board of special inquiry hearings, at which the cowed and ignorant immigrant is not permitted to have the assistance of counsel or other advisers, would often not be a satisfactory way of establishing the right to this exemption, which may turn, not merely on prosecution of the individual, but on general discriminatory laws and regulations. When this kind of exemption from the literacy test was first suggested in Congress, on June 25th, 1906, in the form of the so-called Littauer amendment which the House of Representatives adopted, both as an exception to the literacy test and the likely-to-become a public charge clause, (Cong. Record, Vol. 40, pp. 9164-7), Congressman Grosvenor criticized the amendment, which was then in a form avowedly taken from the British Alien Act of 1905, and did not enumerate the persons to whom the proof should be made. He said (p. 9166):

> "But what is religious persecution or what are religious grounds? Are we to constitute our Board of Immigration at the ports of our

> country a court to try an immigrants' religious opinions?''

As is well known, the literacy test, as well as this exemption, were voted down by that Congress, the compromise being adopted that an Immigration Commission was appointed to study the question instead. After its reports were rendered, the literacy test was reported anew by the House Committee on Immigation on April 16, 1912 (House Report No. 559 of 62nd Cong., 2nd Session, April 16, 1912) as part of H. R. 22527, and now read, to meet such objections:

> Sec. 3. That the following classes of persons shall be exempt from the operation of this act, to wit (a) All aliens who prove to the satisfaction of the proper immigration officer *or to the Secretary of Commerce* and Labor that they are seeking admission to the United States *solely* for the purpose of escaping from religious persecution.

The report which accompanied the bill stated (*Id.* p. 2):

> "We believe that those who are fleeing from religious persecution should find a city of refuge on our shores. Hence the provision exempting immigrants of that class from the test where they are otherwise admissible."

It will be remembered that Board of Special Inquiry hearings are governed by the provisions of Sec. 17 of the Immigration Act of 1917 that

> "*All hearings before such boards shall be separate and apart from the public*, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor."

Rule 15 of the Secretary's Regulations concerning Board of Special Inquiry hearings qualifies the statute still more by adding the proviso:

> "Provided, First, that such friend or relative is not and will not be employed by him as counsel or attorney; second, that if a witness, he has already completed the giving of his testimony; third, that he is not an agent or a representative at an immigration station of an immigrant aid or other similar organization; and, fourth, that he is either actually related to or an acquaintance of the alien."

It is obvious that under such conditions, an immigrant unfamiliar with our laws and customs, nervous and cowed, and afraid to volunteer any information, and testifying through interpreters, themselves only moderately intelligent, can seldom intelligently adduce the evidence before the Board of Special Inquiry necessary to bring himself within such exemption, or to secure corroborative evidence there. In proceedings before the Secretary, for instance, under sec. 18, where counsel is permitted, the situation is quite different, however. There counsel is at hand, and evidence can be secured much more readily, and the very fact that the strict rules of legal evidence do not obtain there, makes that forum a much more satisfactory one than even a court, to establish the facts called for by the religious refugee exemption, and their corroboration. Consideration of the nature of this kind of evidence shows that, except through the application of the principle of taking judicial notice of the facts, it is very difficult to prove these facts in a court of law. Many incidents are often involved, occurring in distant places, and to many third parties, many of which

may not be within the personal knowledge of the alien fleeing from religious persecution. It is very difficult also to secure corroborative witnesses so far away, having personal knowledge of the facts. The theory of the statutory exemption was that, as in the case of the English statute, these facts should be largely shown by *public fame and admissible hearsay*, in order to corroborate the testimony of the alien claiming to flee from religious persecution.

A somewhat similar issue, but a much simpler one, was involved with respect to the exclusion of criminals convicted of offenses involving moral turpitude under the immigration laws, as considered in

U. S. ex rel Mylius vs. *Uhl*, *210 F. R. 860 C. C. A.*

There the Circuit Court of Appeals in holding that criminal libel is not such an offense, involving moral turpitude under the Act, said:

> "The rule which confines the proof of the nature of the offense to the judgment is clearly in the interest of a uniform and efficient administration of the law and in the interest of the immigration officials as well, for if they may examine the testimony on the trial to determine the character of the offense, so may the immigrant. *How could the law be speedily and efficiently administered*, if an immigrant convicted of perjury, burglary or murder is permitted to show from the evidence taken at the trial that he did not commit a felony, but a misdemeanor only?"

Compare Pearson *vs.* Williams, 202 U. S. 281.

This is analogous to the provision in Section 3 of the Immigration Law, considered hereinbefore, as to admitting children under 16 not accompany-

ing or going to a parent, by special leave of the Secretary of Labor only (*ante* p. 5). On the other hand, on the ordinary appeal to the Secretary from the Board of Special Inquiry Sec. 17 of the Immigration Law confined the appeal to the evidence taken by the Board of Special Inquiry.

Moreover, as above pointed out, the offer to give bond against the aliens becoming public charges is in terms addressed only to the discretion of the Secretary of Labor, under Section 21 of the Immigration Act, and the Circuit Court of Appeals may very properly have thought that, with the literacy question eliminated, such offer should be acted upon by the Secretary of Labor before further probably unnecessary judicial proceedings should take place. It had ample authority to take such course under Section 761 of the U. S. Revised Statutes, requiring it

> "to dispose of the party as law and justice require"

Compare Mahler *vs.* Eby, *supra.*

In habeas corpus proceedings under Sec. 761, after an unfair or improper administrative hearing is established, mere unsatisfactoriness in the state of proof may justify ordering a new administrative hearing (Compare U. S. *vs.* Rio Grande Co., 184 U. S. 416).

POINT II.

Mrs. Waldman was exempt under the religious refugee exemption of the literacy test, and illegal and unauthorized departmental regulations constrained the immigration officials in passing upon the questions involved.

(a) *It is difficult to see how the immigration authorities could have failed to sustain the contention that she and her children are religious refugees, within the exemption of the Literacy Test.* She lived at Proskurow at the time of the Proskurow pogrom of Feb. 1919 in which 25 relatives of hers were killed, and she and her children had to hide to escape death. On two other occasions since then, there was a general looting there of Jewish property. She testified categorically that they were in fear of a repetition of pogroms, as well she might, and that she left as soon thereafter as she could (in Feb. 1921), seventeen months before arriving here, having taken temporary refuge at Lemberg in Eastern Galicia, pending receipt of money from here, and securing of passport and its vise, in view of our Quota Law.

The supplementary matter extracted in this brief from reliable sources (*ante* p. 8 *et seq.*) shows that these Ukrainian pogroms were among the most disgraceful and far-scaled in history, and that is particularly true of the Proskurow massacre, in which Jews alone were victims, more than 1200 Jews having been killed there out of about 25,000, and 600 wounded. The Ukrainian pogroms numbered 1235, and resulted in the killing of 70,000 Jews, and driving from their homes of

500,000 persons and rendering 200,000 children orphans. Violence against the Jews in Proskurow took upon itself such dimensions that on Dec. 24, 1920, atrocities were again made a matter of record. In the province of Podolia (Podolsk), in which Proskurow is located, and in the Ukraine in general, anti-Jewish atrocities are shown to have continued until after the family left Proskurow. Unless the statute should be construed as requiring the aliens to have sacrificed their lives before getting the benefit of the exemption, it is difficult to conceive of a case falling more clearly within the statute than this.

Of course the aliens were quite inadequately interrogated by the Board. The statute does not limit religious persecution to the form of pogroms, and the petition in habeas shows that Mrs. Waldman was actually ordered to be shot, and was imprisoned and escaped from prison, which facts an intelligent examination and interpretation would have brought out. Moreover, the statute expressly confines the inquiries to the "country of last permanent residence," so that the facts elicited as to more favorable conditions in Eastern Galicia, the district of temporary refuge, were entirely irrelevant and misleading. It will also be observed that the statute makes the "country" of last permanent residence the unit, so that the conditions in Ukraine in general down to departure should have been considered.

(b) *Improper and unauthorized regulations as to the character of proof requisite have in effect nullified this exemption entirely, as shown by this case and several others recently before the courts.* Subd. 7 of Rule 4 of the Regulations applicable

improperly provided: "*Clear and convincing proof of claims of exemption from the illiteracy test shall be required in every instance*" (See p. 18 *supra*).

Charges to juries couched in such terms have been repeatedly disapproved of as confusing and improper, a fair preponderance of evidence only being required in civil cases, with the possible exception in some jurisdictions of cases, here inapplicable, involving fraud, reformation and specific performance, and transactions with deceased persons.

Morrow *vs.* Campbell, 118 Ala. 330, 341;
Harnish *vs.* Hicks, 71 Ill. App. 551;
Murphy *vs.* Waterhouse, 113 Cal. 467;
Thompson Co. *vs.* Interst. Comm. Comm. 193 F. R. 682;
Walker *vs.* Collins, 59 F. R. 70, 74 C. C. A.;
Miller *vs.* Steele, 153 F. R. 714, 721, C. C. A. ("Clear and unequivocal", erroneous);
U. S. *vs.* Regan, 232 U. S. 37, 48;
Moot *vs.* Business Men's Inv. Ass., 157 N. Y. 201, 211.

When issued by a superior officer having full power of removal, as here, they become all the more coercive and improper.

In Harnish *vs.* Hicks, *supra*, the Court held that it was error to charge the jury that payments must be established "by a clear preponderance of evidence," saying:

> "This was error. In a civil case the party upon whom the burden of proving the affirmative of an issue is cast, is only required

to establish it by a preponderance of the evidence; it is sufficient if the weight of the evidence inclines to his side. *The requirement of a 'clear' preponderance implies, and would be likely to be understood by the jury as requiring something more satisfactory, convincing and decisive than a mere inclining of the scales.* Mitchell *vs.* Hindman, 150 Ill. 538 and cases there cited."

In Morrow *vs.* Campbell, *supra*, the Court said:

"In civil causes the proper measure of proof is reasonable conviction, or satisfaction of mind, and *a charge which requires 'clear and convincing' proof of a fact exacts too high degree of proof.* Wilcox *vs.* Henderson 64 Ala. 535."

In *Thompson Co.* vs. *Interst. Comm. Commission, supra*, five judges constituting the Commerce Court united in holding it error to exact "conclusive proof," and laid down the rule that in civil cases, complainant need never prove his case by more than a preponderance of the credible evidence.

In U. S. *vs.* Regan, *supra*, this Court, speaking by Mr. Justice Van Devanter, held that, even in civil actions for penalties, it is error to require more than "reasonable preponderance of the evidence."

Similarly, in

In Moot *vs.* Business Men's Investment Assn. *supra*, the New York Court of Appeals said:

"But it is said that the language of the contract was that the deed should convey a good and satisfactory title. Much stress is placed upon the word 'satisfactory.' We think that

> word in no way changes the contract. A good title must be regarded as a satisfactory one. As was said by Chief Justice Kent, 'Nor will it do for the defendant to say he was not satisfied with his title, without showing some lawful encumbrance or claim existing against it. . . . The law in this case will determine for the defendant when he ought to be satisfied.' "

The numerous authorities construing the provision of standard life insurance policy requirements for "satisfactory" proof of death are similar (Buffalo Loan Co. *vs.* Knight Templar Ass., 126 N. Y. 450, 453).

In Walker *vs.* Collins, *supra*, the Circuit Court of Appeals, Caldwell and Sanborn, JJ., concurring, said:

> "In Bouvier's Law Dictionary (14th Ed.) the term 'satisfactory evidence' is defined to be that evidence which is sufficient to produce a belief that the thing is true; in other words, it is 'credible evidence.' The Century Dictionary defines 'satisfactory evidence or sufficient evidence' to be 'such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced.' No better definition of these terms can be given, and it was in this sense presumably that the jury understood them."

The words of the statute "shall prove to the satisfaction" of the officials, authorizes no higher standard of proof than ordinarily; "satisfied" means the same as "find" or "believe."

Walker *vs.* Collins, *supra;*
Callan *vs.* Hanson, 86 Iowa 420, 422;

Sams Co. *vs.* League, 25 Col. 129, 135; Terra Haute Co. *vs.* Payne, 45 Ind. App. 132, 142.

The language is the same in form as under the Chinese Exclusion Law provision (Sec. 3 of the Act of 1892) requiring defendant to "establish by affirmative proof to the satisfaction" of such justice, judge or commissioner, etc., with the significant omission of the words "by affirmative proof" and even under that Act, this Court and the lower courts have on occasions, reversed the decision at nisi prius (Li Sing *vs.* U. S., 180 U. S. 486; Tom Hong *vs.* U. S., 193 U. S. 517; Lui Hop Fong *vs.* U. S., 209 U. S. 453).

In fact, it is quite clear that the terms were used in this statute so as to obviate the necessity of strict legal proof, in view of the necessity of considering hearsay evidence and "common fame" on such question as religious persecution, manifested not merely by overt acts, but by discriminatory laws and regulations.

In singular contrast to this regulation is the one promulgated in England under their Aliens Act, which may properly be considered, as our act was avowedly taken from the British one, and this Court has held that in such cases, the construction placed in such other jurisdiction is germane (Interst. Comm. Comm. *vs.* B. & O. R. Co., 145 U. S. 263).

Soon after the British Act was passed, Home Secretary Gladstone on March 9th, 1906, instructed the immigration boards that (Parliamentary Debates, 4th Series, Vol. 153, p. 1321):

> "*he hopes that, having regard to the present disturbed condition of certain parts of the*

> *Continent*, the benefit of the *doubt where any doubt exists, may be given in favour of any immigrants* who allege *that they are fleeing from religious* or political persecution in such districts."

This regulation became the subject of a Parliamentary interpellation. Answering the same, Sir Edward Carson, late Attorney General, said (Id. pp. 1326-7):

> "He believed that the Act was one which required very great discrimination in its administration. He (Mr. Gladstone) had told the officers that in cases in which they were in any doubt as to whether the alien was a political or religious refugee, they ought to give him the benefit of the doubt. He (Sir Edward Carson) should have thought that was the duty of the immigration officers without any instructions whatever. That was an ordinary rule in the administration of all Acts of Parliament."

Lord Chancellor Loreburn, after having taken some time to consider the question, rendered the following opinion (Id. Vol. 155, pp. 669-71):

> "The Act provides that in the case of an immigrant who proves that he is seeking admission to this country in order to avoid persecution on religious or political grounds, he may be admitted even though he falls within the description of an undesirable immigrant. *This cannot mean that he has to prove all the facts in regular form of law by sworn evidence*, for there is no provision in the Act to allow an oath, or to empower the officer to call or swear a witness, and he has no court or anything like it. *I think the Act means that the officer is to judge on the best information he can get and to make up his mind*

as well as he can. It is a very clumsy piece of legislation. *Generally no information on the subject can be obtained except from the immigrant himself or by common fame.* If in these circumstances the officer feels some doubt as to how he should make up his mind, *I see no reason why he should not give the immigrant what is called the benefit of the doubt.* That is my view of the construction of the Act. * * *

The Act is very much wanting in precision as a good many acts are in these days, I am sorry to say, and must be looked at fairly, and as a whole. For example, no one will suppose that Parliament intended the Act to be so construed as that a woman or child who would perish if refused admission ought to be refused, or that a man who would go back to certain execution for his religious opinions should be turned back; and yet if the very strictest letter of construction be placed on the Act, that might in some circumstances be the result. This, like all other Acts, ought to be reasonably construed . . . What would (be) the effect if they put a certain construction on *the Act which Parliament intended to be humane as well as to provide an effective preventive against the immigration of undesirable aliens? To strain the construction of the Act might produce results which every Member of this House would deplore.* It ought to be reasonably construed for the purpose of carrying out the fair spirit of the Act" (See also *Sibley and Elias' "The Aliens Act and the Right of Asylum"*, London 1906, pp. 130-7).

This is in line with the rule of law, so often applied under the immigration laws, that statutes in derogation of individual liberty should be strictly construed.

The Japanese Immigrant Case, 189 U. S. 86, 100;

U. S. ex rel Bilokumsky *vs.* Tod, 263 U. S. 149;
Moffitt *vs.* U. S., 128 F. R. 375, 378 C. C. A.;
Redfern *vs.* Halpert, 186 F. R. 150 C. C. A.;
Lieber's Hermeneutics (3rd Ed), 128-9, 137;
Am. & Eng. Ency. of Law (2nd Ed) Vol. 26, pp. 661-2, 659, 646.

As said by the C. C. A. in Redfern *vs.* Halpert, *supra*, in adopting the opinion of the lower court:

> "*The immigration statutes are very drastic, deal arbitrarily with human liberty, and I consider they should be strictly construed.*"

As said by Mr. Justice Brandeis, speaking for the Court in the Bilokumsky case:

> "Deportation is a process of such serious moment that on all controverted matters, the executive officers should consider the evidence with close scrutiny."

As said by the N. Y. Appellate Division in *Martin* vs. *Goldstein*, *supra*, in applying what it describes as a well-recognized canon of construction:

> "A penal statute should always be liberally construed in favor of civil liberty, or, to adopt the language of an eminent text-writer upon this subject, '*Let everything in favor of power be closely construed, everything in favor of the security of the citizen and protection of the individual, be liberally and comprehensively interpreted*, for the simple reason that power is power and therefore

> able to take care of itself, as well as tending by its nature to increase, while the citizen may need protection' Lieber Herm C. 6 sec. 10."

It will be furthermore noticed that, unlike certain other provisions of the statutes, this section does not throw the burden of proof on the alien to establish the exemption, and the principle of *expressio unius* applies, *to throw it on the Government instead. This regulation wholly violates this.* The excluding clause in Sec. 3 reading:

> "persons whose tickets or passage is paid for with the money of another or who are assisted by others to come *unless it is affirmatively and satisfactorily shown that* such persons do not belong to one of the foregoing excluded classes,"

throws the burden of proof on assisted aliens, but shows that it was not intended by Congress in other cases.

It was so held in

> U. S. ex rel Castro *vs.* Williams 203 F. 155 at 156 Ward J.;
> U. S. ex rel Bilokumsky *vs.* Tod, 263 U. S. 149.
> U. S. ex rel Boxer *vs.* Tod, 294 F. R. 628, C. C. A. *supra.*

Compare 26 Opinions Attys. General 199; 410. Of course the burden of proof provision of the Chinese Exclusion Laws is here inapplicable (Bilokumsky *vs.* Tod, *supra*), nor is the recent provision, Sec. 23 of the Act of May 26th, 1924, applicable, which was enacted long after this case was decided, though it does throw the burden of

proof on the alien. The report of the Committee of the House of Representatives which reported this clause in the Act of 1924 (Report No. 350 of the 68th Congress, 1st Session p. 19) says, in explanation of this clause:—

> "An alien seeking to enter the United States should not stand mute, but should assist the Government by showing admissibility if he can,"

showing that Congress merely aimed at the abuse of alleged aliens standing mute. (U. S. *vs.* Sing Tuck, 194 U. S. 161, 166; Bilokumsky *vs.* Tod, *supra*). To give it any greater effect as applied to star-chamber proceedings before boards of special inquiry, with counsel denied, would lead to the grossest kind of hardship and to serious abuses.

The regulation in question cannot therefore be justified and clearly transgresses the limitations placed upon the validity of departmental regulations to "reasonableness" and non-modification of the statute itself.

Morrill *vs.* Jones, 106 U. S. 466;
Williamson *vs.* U. S., 207 U. S. 425, 461-2;
U. S. *vs.* Antikamnia Co., 231 U. S. 654;
Waite *vs.* Macy, 246 U. S. 606;
The Parthian, 276 F. R. 903 C. C. A.;
In re Kornmehl, 87 F. R. 315 Lacombe J.
Lee Gong Yung *vs.* U. S., 185 U. S. 306, 307;
U. S. *vs.* Dominici, 78 F. R. 334, 338 C. C. A.;
Ford *vs.* Standard Oil Co., 32 N. Y. App. Div. 596, 601;
Newton *vs.* Belger, 143 Mass. 598;
28 Cyc. 368-70; 744; 762-6;

(c) *The phraseology of the exemption clause and its legislative history clearly show that it was intended to exempt persons in relators' position. In fact, just such conditions as induced her to leave the Ukraine were the occasion of its enactment.*

Reference has already been made to the fact that in 1906, when the House of Representatives passed a literacy test for immigrants, it avowedly adopted language based in the British Aliens Act of 1905, which exempted religious (and political) refugees (Congressional Record Vol. 40 Part 10, pp. 9164-7). In the British Act, the exemption was even from the likely-to-become-a-public-charge provision, there being no illiteracy test. In our House, it was first offered by Mr. Littauer and adopted as an exemption to the same clause, and then adopted as an amendment to the literacy test, when offered by Mr. Denby. The word "solely" appeared in the British Act, as qualifying

> "seeking admission *solely* to avoid prosecution or punishment on religious or political grounds . . . or persecution involving danger of imprisonment or danger to life or limb on account of religious belief",

and Mr. Littauer's amendment had wisely omitted this word, as motives are always mixed. Thereupon Mr. Gardner of the Immigration Committee, the chief sponsor of the literacy test, said (*Cong. Record, Id.* p. 9165):

> "Mr. Chairman, this amendment purports to be a copy of the amendment in the British aliens act which I hold in my hand. It is a

> copy with a very important difference. The British aliens act says: 'in the case of an immigrant who proves that he is seeking admission to the country solely to avoid persecution' * * * Now, I want to say that if an exemption is carefully drawn to prevent the educational test applying to these unfortunates, I shall not oppose it if it be carefully guarded and drawn. * * * *The educational test is a new test, and if it is adopted, it might be very proper to make this exception.*"

In support of his amendment, Mr. Littauer said (Id. p. 9164):

> "Mr. Chairman, our forefathers sought refuge on this continent to escape from civil and religious persecution. The very foundation of this Government was attachment to civil and religious liberty. That heritage never demanded or deserved greater recognition than on this day, when we are confronted with the horrors of the Russian situation from Kishinef to Bialystock (applause), horrors depicted in lurid statements in the press throughout the world, arousing the just sympathy of humanity. To refuse to the political or religious refugees who seek admittance to our country, to refuse to permit them to enjoy the blessings of our land, would prove that we are unworthy of our origin, and we do not hold in just esteem the heritage of our fathers." (applause)

Judge Goldfogle, also of the Immigration Committee, supported the Littauer amendment, stating, however, that it had been his intention to offer it as an amendment to the literacy test provision, but pointing out that discriminatory laws and practices, and not merely fear of personal violence, were involved. He said (Id. pp. 9164-5):

> "In many instances and in many places in Russia denied the right to enter the schools, and then again compelled because of cruel and restrictive laws to live under conditions in certain places that render education impossible to many, you must not be surprised that the refugees oft times come unable to read or write so as to pass an educational test."

Mr. Littauer accepted Mr. Gardner's suggestion, and inserted the word "solely," and it was adopted by the House as an amendment to the general provisions of the law, and then to the literacy test.

As pointed out, however, both the Littauer amendment and the entire literacy test were dropped in 1907, in favor of the substitute appointment of an "Immigration Commission", to investigate the question fully, and active consideration of the literacy test in Congress was postponed till 1912.

In the British Parliament, in debating this very Aliens Act, the language had been severely criticized as too narrow, and as not expressing the legislative intent on account of the use of this very word "solely". The Prime Minister, Mr. Arthur Balfour, said: (Parliamentary Debates, 4th Series Vol. 149, p. 1283):

> "We have heard a great deal of the possibility of Jews and others—for a moment I confine myself to the Jews—coming to this country in an absolutely destitute condition, and being rejected under this bill from our shores, *although they were flying from religious or political persecution. Nobody desires that such a contingency should occur.* * * * The great Jewish community, without

> the smallest difficulty, can see to it that no man seeking the hospitality of this country should ever be rejected from these shores."

Mr. Asquith said (Vol. 145, p. 743):

> "I do not suppose that one in ten (of the refugees) could show that they were seeking admission solely for the purpose of avoiding persecution. *We want words that are wider and more elastic, if we are to carry out the common object of us all—which is that these unfortunate persons, victims of social and political prejudices, shall in the future as in the past, receive free admission to our shores.*"

Sir Rufus Isaacs, now Lord Reading, said (Vol. 148, p. 1189):

> "If the proposed concession meant that the Home Secretary desired to exclude from the operation of the clause all who were forced to flee from their country because of persecution on religious grounds, the words were inept for that purpose. If, on the other hand, the right honorable gentleman did not mean to exclude such persons from the operation of the clause, the concession was illusory and not intended to have the effect desired by many members on either side of the House."

The U. S. Immigration Commission, in its Recommendations (Reports Vol. I, p. 45) said, while recommending the Literacy Test:

> "While the *American people, as in the past, welcome the oppressed of other lands*, care should be taken that immigration be such both in quality and quantity, as not to make too difficult the process of assimilation."

The phraseology adopted by the House Committee on Immigration in 1912 and its reasons, have already been quoted herein (*ante*, p. 27). In the Senate the same year, Senator Lodge who was in charge of the bill there, offered an amendment, employing the language of the House bill, intentionally confining the exemption to religious, as distinguished from political, refugees, and in answer to an inquiry from Senator Stone: "Where there is now religious persecution? Who would be subject to it?" (Cong. Record Vol. 48, p. 5020) said:

> Mr. Lodge: "*I think there is something very much resembling religious persecution in Russia. I think also that, in the case of some of the Christians in the Turkish Dominions, there is religious persecution.*"

The "Hearings" of the House Committee on Immigration of 1912 (pp. 33-4) contain express statements from the Chairman of the Committee, Mr. Burnett, and Congressman Hayes, of their desire to exempt the Russian Jews from the literacy test as victims of religious persecution.

It was in this form, with the word "solely" in the Act and without any definition of "religious persecution" that President Taft vetoed the Literacy Test Bill on Feb. 14, 1913 (Senate Document 1087 of the 63rd Cong., 3rd Session). In the printed "Hearings" of the House Committee on Immigration in Dec. 1913, on H. R. 6060 (pp. 199-209), special attention was called by Mr. Max J. Kohler to the unsatisfactory character of an amendment using the word "solely," as recognized in England too, in the light of the very passages of the English debates there also quoted. Under date of Jan. 31, 1914, Secretary of Labor

Wilson also suggested an amendment omitting that word (House Document No. 689 of the 63rd Cong. 2nd Session p. 5). Pres. Wilson's veto of Jan. 28, 1915 (House Document No. 1527 of the 63rd Cong. 3rd Session) was based upon the inclusion of the literacy test and also specifically because of the non-exemption of political refugees, as a departure from hallowed American traditions concerning right of asylum. In the printed "Hearings" before the House Committee on Immigration of Jan. 20 and 21, 1916 (pp. 13-15, 25 and 32), Mr. Louis Marshall severely criticized the phraseology of this earlier exemption clause and particularly the use of the word, "solely", and suggested as a substitute, the modification of the earlier language by omitting the word "solely" and including the adopted definition of "religious persecution." He said:

> "*Mark the word 'solely.'* That means that must be the only purpose, the only desire, the only intent. You have heard of the persecution to which the Jews are subjected in Russia. But there are in Russia 6,000,000 Jews who live and have lived there, many of them for centuries, who are as much and perhaps longer residents there than perhaps some of the ruling classes, and yet who have been subjected to all kinds of discriminatory laws and regulations, the like of which have never been known in any part of the world at any period in the World's history. * * * No truthful man can say that he would not be coming here for two purposes, one, the primary purpose, without which he probably would never have moved—that of escaping from religious persecution—and secondly, to live, because if he said 'I came here without any money, and I expect to do nothing; I only came here to escape persecution,' he would be at once called an undesirable, be-

> cause he would become a public charge in almost no time, and therefore at once removed by the deportation agents of the Government. * * * *I have sought to define persecution, because to the average mind, persecution might imply that there must have been some sudden outpouring of prejudice and violence, as on Bartholomew's Night, or as in the Russian pogroms of some few years ago.* * * * The poor man, the immigrant of moderate means, who is driven to seek asylum here by the most vile and most oppressive persecution disclosed in the history of the world, as in the case of the Russian and the Roumanian Jew, the Protestant Finns and the Catholic Poles, cannot conscientiously say that he will not seek employment or engage in business, for that would not be the truth. He expects to work. He expects to find a life of usefulness and not one of idleness. But if he tells the truth and admits his purpose, if this bill is enacted, he will be told 'You are not here solely because you are seeking refuge from political and religious persecution. We are sorry for you, but you cannot be admitted.'"

These suggestions were adopted, and the Burnett Bill (H. R. 10384) which was ultimately passed over Pres. Wilson's veto in 1917, was reported by the House Committee (House Report No. 95 of the 64th Cong. 1st Session, Jan. 31, 1916, p. 6), phrased as it stands on our statute-books. In the Senate Committee, this same language was adopted, and the Committee Report (Senate Report No. 352 of 64th Cong. 1st Session) stated:

> "The exception to the illiteracy test (page 9, lines 10 to 18) has been changed from the language in which it was couched in H. R.

6060, *materially clarified, and made acceptable to many who objected to the provision as previously drawn.*"

Right of asylum for the religious refugee has, of course, been a fundamental principle in English and American history. As said in Thomas Erskine May's "Constitutional History of England" (1880 Edition Vol. II, p. 283):

> "It has been a proud distinction for England to afford an inviolable asylum to men of every rank and condition, seeking refuge on her shores from persecution and danger in their own lands. England was a sanctuary to the Flemish refugees driven forth by the cruelties of Alva; to the Protestant refugees who fled from the persecution of Louis XIV; and to the Catholic nobles and priests who sought refuge from the bloody guillotine of revolutionary France. All exiles from their own country,—whether they flew from despotism or democracy,—whether they were kings discrowned, humble citizens in danger —have looked to England as their home. Such refugees were safe from the dangers which they had escaped. No solicitation or menace from their own government could disturb their right of asylum; and they were equally free from molestation by the municipal laws of England."

In

> *Regina* vs. *Bernard*, 8 *State Trials N. S.*, 887 at 1055, 1061 (1850),

Chief Justice Campbell, in charging the jury, well said:

> "It has been the glory of this country to afford (right of asylum) to the persecuted

> foreigner. That is a glory which I hope ever will belong to this country."

Scarcely a passage is to be found in the "Messages" of our Presidents, more frequently quoted than Jefferson's Presidential Message of 1801, which sounded the death-knell of the Alien and Sedition Laws, in his famous rhetorical question (Richardson's "Messages" I 331):

> "Shall we refuse to the unhappy fugitives from distress that hospitality which the savages of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on these shores?"

See

"The Right of Asylum, With Particular Reference to The Alien" by Max J. Kohler in Vol. 51 of the "American Law Review" pp. 381-406 (1917).

The regulation of the Secretary of Labor, here criticized, has resulted in effect in eliminating this exemption provision from the statute. Scarcely a single person has been admitted to the country under this exception, despite the intent of Congress. In above-cited case of

> U. S. ex rel Boxer *vs.* Tod, 294 F. R. 628

the order of discharge of the District Court was reversed, under peculiar facts, with the result that the decision has been wholly misconstrued by the administrative officials. There the alien had lived in the United States and left in July 1914, to bring his family over from Russia, but the war forced him to change his plans. His earning conditions improved in the section of Russia where he lived, and he decided to remain there in

1920, but had his passport renewed. In 1922 a pogrom occurred in his home town, his house was set afire and wife and children killed and he was wounded in the neck. Only Jews were attacked. He invoked the religious refugee exemption, but the excluding decision of the Board of Special Inquiry was affirmed by the C. C. A. (the District Court decision being reversed), on the ground that the Board was entitled to find that he did not come to the United States to escape religious persecution, but had previously planned to come. It would seem that the significant omission of the word "solely" was overlooked by the Court, but the facts were so peculiar that the case cannot serve as a precedent. The only case in which the courts afforded relief under this exemption, seems to be the case of

In re Liba Zibranetzska, a Russian Jewess of 19 and her young brother and sister, admitted without written opinion by Judge Lowell in Boston in Feb. 1924, who reversed the immigration authorities and found "there is religious persecution in Russia" (Boston "Herald", Feb. 13, 1924; N. Y. Times, Feb. 13, 1924).

As hereinbefore indicated, the facts testified to before the Board can, of course, often be augmented by resort to appropriate sources of information, and there is no authority for rejecting credible testimony, in immigration cases, even of such interested witnesses (U. S. ex rel Basile *vs.* Curran, 298 F. 951 Learned Hand J; U. S. ex rel Palermo 296 F. R. 345 C. C. A.; Ex. p. Petterson, 166 F. 536, 539; Gegiow *vs.* Uhl, 239 U. S. 3). As said by this Court in

> U. S. ex rel Catoni Tisi *vs.* Tod, 264 U. S. 131,

the courts should grant relief, where

> "the finding was made in wilful disregard of the evidence to the contrary."

POINT III.

The regulation of the Secretary of Labor concerning method of administering the literacy test is unreasonable and illegal.

As shown in above quotation from the Regulations (*ante*, pp. 16-17) an extraordinary method has been devised to test the immigrant's ability to read:

> "The services of an interpreter shall be used for interpreting into spoken English as read, the printed matter read by the alien, so that the examining inspector may compare such interpretation with the slip of corresponding serial number containing the English translation of the same reading matter."

It is obvious that the alien is held responsible, under this scheme, for the blunders of the interpreter. If the interpreter retranslates badly, the alien is judged to have read incorrectly! Unless the interpreter is omniscient, variances in retranslating are bound to occur! Of course, there isn't the slightest authority for assuming that the interpreter's retranslation will be identical with the original English, or that the interpreter is infallible. In fact, in the letter of Secretary of Labor Nagel, which President Taft adopted as his grounds for vetoing the Literacy Test Act of

1913 (Senate Document No. 1087 of the 62nd Cong., 3rd Session p. 3) it was well said:

> "Finally, the interpreters will necessarily be foreigners, and with respect to only a very few of the languages or dialects, will it be possible for the officials in charge to exercise anything like supervision."

In

Montotaro Eguchi *vs.* U. S. 260 F. R. 144 C. C. A.

the court held that the literacy test requires reading *understandingly*

> "the law was not dealing with *parrots*, but with human beings, who are supposed to have some intelligence."

Even that construction of the statute is very doubtful in view of its terms and the congressional debates. There, however, the regulation required the alien to do simple things, called for by the slip handed to him. No such extraordinary regulation as this seems to have ever before been considered by the Courts, and it is submitted that it is unreasonable under the authorities concerning validity of departmental regulations, above cited, and illegal (p. 41). Compare authorities as to the copyrightability of translations, as involving originality and individuality in the translator (*Leeser* vs. *Sklarz*, 15 Fed. Cases 8276a; *Shark* vs. *Rankin*, 21 Fed. Cases, 12804; *Stevenson* vs. *Fox*, 226 Fed. Rep. 990) and the opinion of this Court with Mr. Justice Holmes as spokesman in *Bleistein* vs. *Donaldson Co.*, 188 U. S. 239, at 249-50.

POINT IV.

The exclusion cannot be sustained on the theory that relators were likely to become public charges or are assisted aliens, and this question is not open here, because not raised by the petition for the certiorari.

Mrs. Waldman, according to the evidence, was able, through her work as seamstress, to support herself and her children; not merely at Proskurow, but also in the untried and difficult conditions prevailing in Eastern Galicia. There is no reasonable ground for supposing that she and her children are likely to become a public charge under the much more favorable conditions here. On the other hand, here she has a number of well-to-do relatives ready to aid her, and to give bonds against their becoming public charges. The lameness of the seven year old daughter Zenia is purely negligible, as bearing on such likelihood, though the physicians are required to certify every defect, however petty, so that the *facts* involved might be considered by the Board of Special Inquiry. In the recent case of

U. S. ex rel Engel vs. *Tod, 294 F. R. 820 C. C. A.*, the Court properly treated total deafness as an immaterial factor on that issue, and pointed out that "assisted aliens" are not excluded by the act, but merely have to meet the burden of proof. Ever since the decision in

In re Day 27 F. R. 678, 681 Brown, J.,

it has been recognized, as held there as to minors, going to farmers, to whom they were apprenticed:

> "All the means of care or support that are provided for the passenger, and are available for his benefit, must be taken into account. The law intends those only, that are likely to 'become a public charge,' because they can neither take care of themselves, nor are under the charge or protection of any other person, who, by natural relation or by assumed responsibility, furnishes reasonable assurance that they will not become a charge upon the public" (Compare discussion of the English act, *ante*, pp. 44-5).

In

U. S. *vs.* Lipkis, 56 F. R. 427, 428,

the Court well said:

> "When an able-bodied workman comes to this country, who is able to take care of himself and his family, and is likely to procure remunerative work in his trade, it is not the practice to require a bond from him merely because he may have but little ready money, and upon the mere possibility that he may meet with some accident that may make him a cripple and thus render him and his family a public charge. For at the time of arrival he is not likely to become a public charge, his health, capacity for work, and the probability that he will obtain work, furnish ordinary and sufficient security, in the ordinary course of things, against any such liability."

Moreover, as was well said by the Committee of Congress which framed the original "assisted immigration" provision in the Act of 1891, in its Report (House Report No. 3472, p. IV, of the 52nd Congress, 2nd Session):

> "Assisted immigration is of two kinds: Those assisted by friends from this side of

> the water is the best class of immigration, for they have relatives or friends here who will care for them in their untried surroundings. But the immigrant assisted from the other side usually has no friends here, and if any on the other side, their chiefest interest is in getting rid of what is likely soon to become a burden. The assisted ticket immigrant should not be made an excluded class, but our experience has been so unfortunate that it is prudent to have him show affirmatively that he does not belong to one of the excluded classes."

Under the principle of

Gegiow *vs.* Uhl, 239 U. S. 3 (reversing 215 F. R. 573) these aliens cannot be properly regarded as likely to become public charges, and the trouble is that the Board of Special Inquiry still is influenced by the erroneous theory, there involved, that offers of assistance from persons not legally obligated to support the aliens, are to be disregarded, as negligible. It will be remembered that, following the decision in *Gegiow* vs. *Uhl, supra*, the Government confessed error in

Healy *v.* Backus, 243 U. S. 657,

reversing 221 F. R. 358 (C. C. A.), where Hindoos were held excludable as likely to become public charges, on the fantastic theory that prejudice against them would be apt to prevent their securing employment. See also Williams *vs.* U. S. ex rel Klein, 206 F. R. 460 C. C. A.

Gegiow *vs.* Uhl, *supra*, has been repeatedly followed and applied since, to prevent findings

of likelihood to become public charge without substantial evidence.

> Howe *ex.* U. S., 247 F. 292 C. C. A.
> Ex. p. Mitchell, 256 F. 229.
> Ex. p. Sakaguchi, 277 F. R. 913 C. C. A.

Moreover, as hereinbefore pointed out, the "likelihood to become a public charge" finding as to the children, is really based on the assumption that Mrs. Waldman was excluded (Greenwood *ex.* Frick, 233 F. R. 629 C. C. A.), and falls, if she is admitted. The letter from Assistant Secretary Henning to Senator Colt in the Record (p. 10) indicates that the Department was inclined to reverse the Board of Special Inquiry on the "likely-to-become-a-public-charge" issue, and deemed the literacy question the pivotal one, and this argument is strongly re-inforced by the offer of relatives to give bonds, referred to in the Petition (p. 9). The Circuit Court of Appeals in its opinion (pp. 21-2) therefore correctly said:

> "It remains only to state that the record leaves the case of Zenia in a position where it must be assumed that the decision to exclude was not affirmed by the Department and the Department may very well have disagreed with the local board as to whether or not the physical defect would interfere with the ability of Zenia to earn a living. The fate of the mother and the three children was placed entirely upon the question as to whether or not she could read Hebrew and Yiddish."

In any event, however, as hereinbefore pointed out (*ante*, p. 2) the question is not open here, because not one of the grounds on which the certiorari was applied for (Alice Bank *vs.* Houston Co., 247 U. S. 240).

POINT V.

The Order of the Circuit Court of Appeals should be affirmed.

October 15, 1924.

Respectfully submitted,

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